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In The
Supreme Court of the United States

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors of San Francisco, and TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors for San Francisco,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN AND TOM AMMIANO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court grant certiorari to revisit the nonprecedential opinion of three judges from an eleven-member en banc panel of the Ninth Circuit that the San Francisco Board of Supervisors did not violate the Establishment Clause when it passed a nonbinding resolution criticizing a religious leader for directing a social service agency in San Francisco to stop placing children for adoption with same-sex couples?

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STATEMENT

The San Francisco Board of Supervisors passed a nonbinding resolution criticizing Cardinal William Joseph Levada for directing a Catholic social service agency in San Francisco to stop placing children for adoption with same-sex couples. Petitioners sued under the Establishment Clause, the district court dismissed the complaint, and an en banc panel of the Ninth Circuit affirmed, but without a majority agreeing on the reason for doing so. Due to the fractured nature of the decision below, the uniqueness of the facts of the case, and petitioners' failure to discuss most of those facts, a relatively lengthy background statement is required.

1. In 2003, the Vatican's Congregation for the Doctrine of the Faith published a document entitled "Considerations Regarding Proposals To Give Legal Recognition To Unions Between Homosexual Persons." The purpose of the "Considerations" document was to "give direction to Catholic politicians by indicating the approaches to proposed legislation in this area which would be consistent with Christian conscience." Resp. C.A. Br. 3.

"Homosexual acts," the Considerations document asserted, "are intrinsically disordered." *Id.* Accordingly, "in those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty." *Id.*

The Considerations document further specified that Catholic lawmakers must oppose efforts to place children for adoption with same-sex couples. That is because, according to the statement, "[a]llowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development." *Id.* at 4.

In March 2006 (roughly three years after the Vatican published the "Considerations" document), Cardinal William Joseph Levada, by then head of the Congregation for the Doctrine of the Faith but formerly the Archbishop in San Francisco, issued a directive to the Archdiocese of San Francisco that "Catholic agencies should not place children for adoption in homosexual households." *Id.* Cardinal Levada cited the 2003 Considerations document in support of his directive. *Id.* As a result, the Archdiocese of San Francisco announced it would no longer allow same-sex couples to adopt children through its Catholic Charities agency. *Id.*

This directive was generally not well-received in San Francisco. The San Francisco Chronicle published a stinging editorial, which asserted that the Vatican should be more concerned with "a backlog of some 700 priest-abuse cases" than with "enforcing outdated edicts that rip [communities] apart." *Cardinal Levada's Edict*, S.F. Chron., Mar. 19, 2006, at D-6. Then-Mayor Gavin Newsom, one of the Catholic

politicians the Considerations document sought to influence, cancelled a trip to the Vatican in protest. Pat Murphy and Luke Thomas, *Vatican opposition to LGBT adoption prompts Newsom to nix Rome trip*, Fog City J. Mar. 13, 2006.[1]

For its part, the San Francisco Board of Supervisors adopted a resolution criticizing Cardinal Levada's directive and urging him to withdraw it. The resolution was sponsored by then-Supervisor Tom Ammiano, another Catholic politician. *See Cardinal Levada's Edict*, *supra*. The resolution, reproduced here without all the bold and italics added by petitioner, stated as follows:

> **Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to

[1] In the proceedings below, the City requested judicial notice of the news articles cited herein, not to prove the truth of their contents, but to demonstrate the assertions they contained were in the public realm. The district court denied the request, and the Ninth Circuit, while not commenting on whether the articles were subject to judicial notice, did not rely on them.

negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and

WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and,

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the

> Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

Pet. App. 5a-6a.

Cardinal Levada, the former Archbishop of San Francisco, was likely unsurprised by this reaction. After all, the City is a worldwide leader in the struggle for lesbian and gay equality. It is one of the first in the nation to officially recognize domestic partnerships for same-sex couples. Pet. App. 99a. Entities that have contracts with the City are required to provide the same benefits to the domestic partners of their lesbian and gay employees as they provide to the spouses of their heterosexual married employees. *Id.* Since 2004, the City has been at the forefront of the legal fight to guarantee same-sex couples the right to marry in California. *Id.* And the Board of Supervisors regularly passes nonbinding resolutions relating to discrimination against lesbians and gay men. Between 2000 and 2006, it passed at least 41 such resolutions, including:

- A resolution criticizing the IRS for refusing to recognize domestic partnerships. Resp. C.A. Br. 17.
- A resolution denouncing the Russian authorities for standing by during Moscow's first Gay Pride parade while gay men and

lesbians were assaulted, and singling out the mayor of Moscow for portraying homosexuals as "sexual deviants." *Id.*

- A resolution denouncing then-Secretary of Education Margaret Spellings for her criticism of a television show that depicted a lesbian couple in a positive light and urging her to retract her statement, issue a public apology and "make a public statement in support of tolerance, multiculturalism and free speech." *Id.* at 18.

- A resolution condemning the public relations director of the San Francisco 49ers for creating an instructional video for the players that was viewed as offensive and discriminatory towards gay men and lesbians, and urging the team to work with the City's Human Rights Commission to "develop a plan of action for preventing future discrimination." *Id.*

- A resolution describing the statements of then-Senator Rick Santorum about homosexuality as "discriminatory" and "hurtful" and urging him to step down from his Senate leadership post. *Id.*

- A resolution urging Dr. Laura Schlessinger to refrain from making discriminatory statements about gay men and lesbians, and urging that her show be taken off the air if such statements continued. *Id.*

2. Petitioners – a Catholic advocacy group and two of its individual San Francisco members – sued

the City in federal court, alleging the Board's resolution violated the Establishment Clause. The district court granted the City's motion to dismiss for failure to state a claim. Applying the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court first held the Resolution's primary purpose was "to denounce discrimination against same-sex couples, and to try to preserve for San Francisco children the opportunity to be placed for adoption with qualified families without regard to sexual orientation." Pet. App. 126a. The court rejected the notion that the more incendiary aspects of the Resolution evinced an anti-religious purpose, because "any criticism of Catholic leaders or policies are presented in the context of same-sex adoption – a secular dimension of the City's culture and tradition that the City believes is threatened by the specific directive issued to the Archdiocese." *Id.* at 127a. For similar reasons, the district court concluded the Resolution did not run afoul of *Lemon*'s "primary effect" prong, because a reasonable observer familiar with the context and timing of the Resolution, and with the City's history of promoting lesbian and gay equality, would conclude the Resolution was intended to be secular. Applying the third prong of *Lemon*, the district court rejected the notion that the Resolution created excessive entanglement with religion, reasoning: "There is no regulatory enforcement, no law adopted nor other action taken by virtue of the Resolution. It is merely the exercise of free speech rights by duly elected office holders." *Id.* at 135a.

3. A three-judge panel of the Ninth Circuit affirmed. The panel concluded the Board's secular purpose was evident from the title and preamble of the Resolution, which focused singularly on the Board's desire that Catholic Charities continue to place children for adoption with same-sex couples. Pet. App. 96a-97a. The panel also emphasized the timing of the resolution, observing that the Board did not act in response to the more general Considerations document released in 2003, but three years later, in response to Cardinal Levada's policy directive concerning adoptions in San Francisco. *Id.* at 97a.

Applying *Lemon*'s "effects" prong, the panel acknowledged that "there are statements in the Resolution that, taken in isolation, may be said to convey disparagement towards the Catholic Church," but concluded that "[c]onsidering the Resolution as a whole, with its focus on the City's tradition of promoting and defending same-sex relationships," those isolated statements did not "overwhelm the Resolution's secular dimensions." Pet. App. 105a. And the panel emphasized the City's longstanding practice of promoting lesbian and gay equality, including the Board's practice of doing so by way of nonbinding resolution:

> Just as the "overall holiday setting" can change the message conveyed by a creche, and a "typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of

> endorsement of that content," . . . the Board's well-established practice of responding whenever the equality of gay and lesbian families is called into question necessarily colors the message conveyed by the Resolution. In adopting the Resolution, consistent with past practices, the Board sought to champion same-sex families and nondiscrimination as to gays and lesbians. An objective observer would understand as much.

Pet. App. 108a (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

Responding to petitioner's central argument (namely, that the resolution expressed hostility towards central aspects of Catholic religious doctrine), the panel acknowledged that "what the Board considers secular, Catholic League considers hostile to Catholic religious tenets." *Id.* at 99a. But the panel reasoned that "the government is not stripped of its secular purpose simply because the same concept can be construed as religious." *Id.* at 99a-100a (quoting extensively *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) and *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988)).

Judge Berzon wrote a concurring opinion stating that the majority opinion "carefully and faithfully applie[d] contemporary Establishment Clause jurisprudence to an unusual circumstance, the disapproval rather than approval of religion, embodied in a single Board of Supervisors resolution linked to no affirmative governmental regulation nor displayed

in any continuing fashion in any public location." Pet. App. 112a, 113a. Had the government speech been accompanied by regulation, had the City broadcast the speech in a "more intrusive and permanent way," or had the City enacted a series of similar resolutions rather than just one, the outcome of the case might be different. Pet. App. 114a.

4. An en banc panel of the Ninth Circuit voted 8-3 to affirm the district court's dismissal of the complaint, but without agreement by a majority on the correct reason to affirm. Five members of the panel concluded petitioners lacked standing, three members concluded petitioners had standing but the resolution did not violate the Establishment Clause, and three members concluded petitioners had standing and the resolution did violate the Establishment Clause.

Judge Graber, writing for the five judges who found a lack of standing, deemed petitioners "akin to 'concerned bystanders' . . . who have suffered no injury 'other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" Pet. App. 67a (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 485 (1982)). Reasoning that the resolution did not apply to petitioners, but rather to Cardinal Levada, the San Francisco Archdiocese and Catholic Charities, Judge Graber's opinion concluded:

> Plaintiffs here have expressed their deep and genuine offense. Their status as Catholics and San Francisco residents distinguishes their concerns, at least to some extent, from the concerns of others who may view the resolution as offensive. In the end, however, the resolution carries no legal effect and, perhaps more importantly, does not apply to Plaintiffs.

Pet. App. 69a.[2]

Writing for the three judges who concluded petitioners had standing but failed to state an Establishment Clause claim on the merits, Judge Silverman focused on both the text and the context of the resolution to determine that the City had not run afoul of the first or second prongs of *Lemon*. Regarding the text, Judge Silverman stated: "The reasons given [by the resolution for its opposition to Cardinal Levada's directive] are purely secular, not theological. For example, the resolution contains nothing like, 'The Church has misread the Bible,' or '*Our* God approves of same-sex marriage.'" Pet. App. 35a.

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[2] Judge Graber also rejected petitioner's analogy to Establishment Clause cases involving religious displays. "In the religious display context," she stated, "a plaintiff has standing when he or she encounters the display with some level of frequency or regularity during the course of the plaintiff's typical routine. . . . Here, Plaintiffs read the resolution. But apart from that initial contact, Plaintiffs allege no facts to suggest that they ever would have reason to read the resolution again, as part of their regular routine or otherwise (except to facilitate this litigation)." Pet. App. 75a.

Regarding context, Judge Silverman wrote that the objective observer, who under Supreme Court precedent is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show," would consider the resolution in light of San Francisco's persistent efforts to achieve lesbian and gay equality, and in light of the fact that the Board enacted the measure in direct response to the Vatican's attempt to influence policy within San Francisco. *Id.* (quoting *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005)). Regarding *Lemon*'s entanglement prong, Judge Silverman reasoned that the resolution "was an isolated, nonbinding expression of the Board of Supervisors' opinion on a secular matter, which the plaintiffs have not alleged even potentially interfered with the inner workings of the Catholic Church." Pet. App. 36a. The opinion concluded:

> We would have a different case on our hands had the defendants called upon Cardinal Levada to recant his views on transubstantiation, or had urged Orthodox Jews to abandon the laws of the kashrut, or Mormons their taboo of alcohol. Those matters of religious dogma are not within the secular arena in the way that same-sex marriage and adoption are. The speech here concerns a controversial public issue that affects the civic lives of the citizens of San Francisco, religious and nonreligious alike. I would not construe the First Amendment to prohibit elected officials from speaking out, in their official capacities, on matters of such clearly

> civil import, even if their speech is insolent, stupid, or worse. A church has every right to take a firm moral position on secular issues, but it has no right to prevent public officials from criticizing its position on those secular issues – especially when one of its clergy fires the first salvo.

Pet. App. 37a-38a.

Writing for the three judges who concluded petitioners had standing and stated a claim on the merits, Judge Kleinfeld opined that the resolution constituted unconstitutional "governmental condemnation of Catholic doctrine." Pet. App. 22a. The resolution violated *Lemon*'s "purpose" prong, in Judge Kleinfeld's view, because its text focused on the activities and statements of the Catholic Church:

> The San Francisco government would face no colorable Establishment Clause challenge had they limited their resolution to its fourth "whereas," that "[s]ame sex couples are just as qualified to be parents as heterosexual couples." San Francisco is entitled to take that position and express it even though Catholics may disagree as a matter of religious faith. But the title paragraph, the other five "whereas" clauses, and the "resolved" language are all about the Catholic Church, not same-sex couples.

Pet. App. 23a. Nor did the resolution's context, Judge Kleinfeld reasoned, turn the resolution's anti-religious purpose into a secular one, because the "reasonable

observer" under *Lemon* should not be assumed familiar with the history of San Francisco's efforts to promote lesbian and gay equality. *Id.* at 24a-25a.

Regarding *Lemon*'s "effects" prong, Judge Kleinfeld emphasized the language of the resolution, concluding that the reasonable observer would conclude it conveys a "message of disapproval" of the Catholic religion:

> The "message" in the resolution, unlike, say, the message that might be inferred from some symbolic display, is explicit: a Catholic doctrine duly communicated by the part of the Catholic church in charge of clarifying doctrine is "hateful," "defamatory," "insulting," "callous," and "discriminatory," showing "insensitivity and ignorance," the Catholic Church is a hateful foreign meddler in San Francisco's affairs, the Catholic Church ought to "withdraw" its religious directive, and the local archbishop should defy his superior's directive.

Pet. App. 27a.

Judge Kleinfeld also concluded the resolution ran afoul of *Lemon*'s entanglement prong, reasoning that San Francisco had entangled itself in matters of Church hierarchy in the same way that a Board resolution urging a district court to defy a Ninth Circuit ruling would entangle it in the hierarchy of the federal judiciary. *Id.* at 28a.

Judge Kleinfeld also wrote for the six judges who concluded petitioners had standing to challenge the resolution. This portion of Judge Kleinfeld's opinion found that the individual petitioners had standing because they alleged that their own legislature singled them out in an expression of hostility towards their religion, that they came into contact with the allegedly anti-religious speech, and that this chilled their access to government and forced them to curtail their activities to lessen their contact with their government. Pet. App. 18a. In this regard, Judge Kleinfeld reasoned, the individual petitioners alleged an injury that was concrete and specific enough to distinguish them from other members of the public who might merely find the resolution offensive and believe it to be unconstitutional. *Id.* at 9a. The opinion further concluded that Catholic League had standing because, once its San Francisco members were found to have standing, it easily satisfied the test for associational standing under *Warth v. Seldin*, 422 U.S. 490 (1975).

ARGUMENT

I. THE SUBSTANTIVE ESTABLISHMENT CLAUSE QUESTION PRESENTED BY THIS CASE IS NOT WORTHY OF CERTIORARI.

The substantive constitutional question presented by this case – whether the Board's resolution violated the Establishment Clause – is not worthy of

certiorari for at least four reasons: (1) the ruling below created no substantive Establishment Clause law, because only three of the eleven members of the en banc court opined that the resolution was constitutional; (2) the three-judge opinion does not, in any event, conflict with any other Establishment Clause decision; (3) the legal question presented by this case is unlikely to recur, and its unusual facts make it the worst possible vehicle for the creation of a new Establishment Clause test; and (4) in any event, Judge Silverman and his two colleagues were right to conclude that a local legislature may speak out, even impolitely, when a religious actor attempts to influence secular policy outcomes within its jurisdiction.

A. The Ruling Below Created No New Establishment Clause Law.

Contrary to petitioners' dire predictions about the impact of the Ninth Circuit's "decision," the ruling below created no substantive Establishment Clause law. Because only three of the eleven members of the en banc court concluded the resolution was constitutional, their opinion has no binding effect, even within the Ninth Circuit. *See, e.g., Nevius v. Sumner*, 105 F.3d 453, 460 & n.6 (9th Cir. 1996) (plurality opinion of en banc court not binding precedent within the Ninth Circuit). In fact, Judge Silverman's opinion, with which petitioners take issue, has no greater precedential value than Judge Kleinfeld's opinion, with which petitioners agree. And because neither opinion is binding, substantive Establishment Clause

law is exactly the same – in the Ninth Circuit and elsewhere – as if petitioners had never filed their lawsuit.

This alone renders the case unworthy of certiorari. This Court's Rule 10 emphasizes at every turn that certiorari jurisdiction most commonly lies when a lower "court" has "decided" an important federal question. S.Ct. Rule 10(a), 10(b) & 10(c). The Ninth Circuit did not "decide" the question petitioners claim is so important. The only actual decision by the Ninth Circuit was that the district court did not err in dismissing the complaint. To be sure, this Court reviews judgments rather than opinions, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 & n.7 (1982), but the judgment should involve a "decision" on an important question of law. While this case may make for interesting discussion, it involves no substantive Establishment Clause decision at all, much less an important one.

B. The Three-Judge Opinion Does Not Conflict With Any Other Court Decision.

Even if Judge Silverman's opinion had been issued by a six-judge majority, it would have created no conflict with a decision of any other court. To establish such a conflict, petitioners must, at a minimum, identify a case in which a plaintiff alleged his government condemned his religion, and the court held that the government's speech violated the Establishment Clause. Petitioners do not identify such a

case, the opinions below did not identify one, and the City is aware of none.

Petitioners are thus relegated to arguing that Judge Silverman's opinion conflicts with cases arising from vastly different factual scenarios. Although they cite virtually every religion case on the books, they single out four: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Pet. 19.

The first of these cases, *Lukumi*, was a Free Exercise case, not an Establishment Clause case. Far from involving nonbinding government speech, it involved the outright criminalization of animal slaughter practices, through an ordinance that was gerrymandered to ensure only members of the Santeria church could be prosecuted under it. 508 U.S. at 535-36. The second case, *Santa Fe*, involved a claim that a school policy allowing prayer at high school football games violated the Establishment Clause. 530 U.S. at 310-11. The third, *Edwards*, again did not involve nonbinding government speech, but rather a state statute that this Court held was designed "to restructure the science curriculum to conform with a particular religious viewpoint." 482 U.S. at 593. And the fourth, *Epperson*, similarly involved a statute that prohibited teachers, on pain of criminal penalty, from discussing the theory of evolution. 393 U.S. at 107. The Court's conclusions that the government violated the First Amendment on the facts of these

cases obviously do not conflict with an opinion that a local legislature did not violate the Establishment Clause when it passed a nonbinding resolution criticizing a religious leader for attempting to influence policy within that jurisdiction.

C. The Facts Of This Case Are Highly Unusual And Present No Important Or Recurring Question That Requires Resolution.

It is unsurprising that Judge Silverman's opinion conflicts with no other court decision, because the facts of this case are highly unusual. It is not often that all of the following events take place: (1) a religious leader attempts to influence policy in a specific jurisdiction; (2) he succeeds in doing so; (3) government officials in that jurisdiction speak out against the religious leader's actions; and (4) followers of the religious leader believe the government speech violates their rights and sue for a judicial declaration to that effect. This case simply does not involve a recurring or important legal question, much less a vexing or widespread problem in society, that would justify a grant of certiorari even absent a conflict among the courts. And because the facts are so unusual, this case could not provide a worse vehicle for reconsideration, as petitioners urge, of the entirety of this Court's Establishment Clause jurisprudence.

The overwhelming majority of Establishment Clause cases involve allegations by a plaintiff that

the government has favored religion – typically through a religious display, an invocation to which the plaintiff was subjected, or the expenditure of tax dollars in furtherance of some policy. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 689-91 (2005) (discussing primarily cases involving religious displays); *Santa Fe*, 530 U.S. at 310-13 (discussing primarily challenges to invocations at public gatherings); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-52 (2002) (discussing primarily cases involving expenditure of funds). When, in contrast, the government is alleged to have disfavored religion, the claim is almost invariably brought under the Free Exercise Clause, because the government has imposed an actual restriction on religious speech or conduct. *See, e.g., Lukumi*, 508 U.S. at 531 (reciting cases). In this case, a government entity has engaged in nothing more than speech, and the speech is alleged to disfavor religion. That type of First Amendment claim is almost nonexistent.[3]

Although instances in which pure government speech is alleged to disfavor religion are rare enough, that still does not fully capture this case's outlier

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[3] The only three such cases of which the City is aware are *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005), *Am. Family Ass'n v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), and *Okwedy v. Molinari*, 150 F.Supp.2d 508 (E.D.N.Y. 2001) (Establishment Clause holding affirmed by *Okwedy v. Molinari*, 69 Fed.Appx. 482, 484-85 (2d Cir. 2003)). In all these cases, the courts rejected the argument that the government speech violated the Establishment Clause.

status in the Establishment Clause universe. It is one thing for the government, uninvited, to engage in speech that might be interpreted as hostile to religion. *See, e.g., O'Connor*, 416 F.3d at 1219 (display of sculpture invoking allegations of priest abuse). It is quite another thing where, as here, a religious leader reaches out to a jurisdiction in an attempt to influence policy, uses controversial language to do so, actually succeeds in changing the policy, and the legislative body of that jurisdiction responds with speech of its own but takes no regulatory action. That kind of case has never come up before. It may never come up again. It is a singularly poor vehicle to revisit this Court's entire Establishment Clause jurisprudence.[4]

D. Judge Silverman's Three-Judge Opinion Correctly Applied The Law To The Unusual Facts Of This Case.

Even though Judge Silverman's opinion did not garner a majority, the result reached by the Ninth Circuit (affirmance of dismissal of the complaint) was

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[4] Nor, in any event, is petitioners' proposed replacement for the *Lemon* test reasonable – it appears heavily to favor the rights of the Judeo-Christian majority over religious minorities, which directly contravenes the Establishment Clause's central goal of preventing the government from prescribing what is orthodox. For example, petitioners' proposed test appears to demand that courts apply rational basis review to a legislative statement that "one God exists," but strict scrutiny to a legislative statement that "more than one God exists." Pet. 18-19.

correct for the reasons he stated. The Establishment Clause does not permit courts to assess government conduct from the perspective of someone who is ignorant of the context in which it occurs. The Clause presumes an observer "familiar with the history of the government's actions and competent to learn what history has to show." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005). An observer familiar with San Francisco's efforts to promote lesbian and gay equality – especially the Board's prior resolutions – would know the Board did not care whether the discrimination was being done by a religious or secular leader. The observer would understand that the Board would have responded in exactly the same way had a powerful international *secular* organization that does charitable work (say, the Bill and Melinda Gates Foundation) announced it would only support programs in San Francisco that discriminate on the basis of sexual orientation. Moreover, an observer familiar with the timing of the resolution would understand that the Board spoke out, not in response to a statement of doctrine put out by the Congregation of the Doctrine of the Faith in 2003, but in response to the specific and controversial attempt in 2006 to influence outcomes on a secular issue of great importance to the people of San Francisco. Finally, the observer would know that the resolution was accompanied by no regulation, and that the City made no effort to disseminate the resolution beyond its normal placement with all other resolutions on the City's website.

Judge Kleinfeld's competing three-judge opinion assumed government officials have no right to respond to such conduct by a religious leader. It argued that the Establishment Clause limits legislative bodies to general statements of policy – that government officials may not specifically respond to the actions of religious groups on matters of civic concern. Pet. App. 23a (arguing that every aspect of the resolution violated the constitution other than the sentence, "[s]ame-sex couples are just as qualified to be parents as heterosexual couples."). However, if a religious group dedicates itself to influencing policy on a secular issue, it must be presumed to have the fortitude to withstand the criticism that inevitably comes from being an active participant in this arena. If, for example, a religious group launched a campaign to convince judges to vote against the death penalty, it could not be heard to complain of criticism by proponents of the death penalty within the government. If a religious group called for terrorist acts within the United States, surely its members could not challenge the constitutionality of a harsh rebuke from the President in a State of the Union address. That a person's policy objectives in the secular arena happen to be driven by religious belief is not a reason to treat him differently. *Cf. McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly

apart from any religious considerations, demands such regulation"); *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988) ("On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive Adolescent Family Life Act funding will agree with the message that Congress intended to deliver . . . is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion.")

Judge Kleinfeld's approach also gives short shrift to the notion that legislators have their own right to speak out on matters affecting the people they represent. "Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process." *Keller v. State Bar of California,* 496 U.S. 1, 12 (1990); *see also Bond v. Floyd*, 385 U.S. 116, 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."). To be sure, government speech is limited at some point by the Establishment Clause, but in determining where that limit lies, Judge Silverman's opinion was right to be solicitous of

legislators' interests in speaking out on matters of secular concern, and Judge Kleinfeld's opinion was wrong to brush aside those interests.[5]

In sum, the only workable approach to this highly unusual Establishment Clause question is that taken by Judge Silverman, whose opinion correctly applied the *Lemon* test to conclude the resolution's primary purpose and effect was not to denounce religion, but to respond to a controversial and successful attempt to affect the lives of San Franciscans in the secular arena.

II. THE NINTH CIRCUIT'S DECISION ON STANDING IS NOT WORTHY OF CERTIORARI.

Petitioners prevailed on the question of standing below and accordingly do not seek certiorari on it. The City argued below, and continues to agree, that petitioners had standing. For standing purposes, it must be assumed, as incorrectly alleged by

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[5] Although petitioners and Judge Kleinfeld do not propose this, one could imagine an argument that although religious actors in the policy arena should not enjoy complete immunity from governmental criticism, there should be some limit on *how* officials may address them. This approach, however, would do little more than thrust judges into the role of "Miss Manners," policing the etiquette but not the content of public officials' criticisms of people who advance policy goals in the name of their religion. Worse, the result would be the emergence, through case law, of a confusing code of speech that officials would be forced to consult before speaking out.

petitioners, that the resolution was a denunciation of the Catholic religion. *See, e.g., In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008). A Catholic resident of the City must have standing to challenge an official resolution denouncing his religion, just as a non-Catholic resident must have standing to challenge a resolution proclaiming Catholicism the official religion of San Francisco. A contrary conclusion would insulate government officials from suit even when they violate the Establishment Clause at its very core, by "establishing" an official religion.

In any event, as acknowledged even by Judge Graber's opinion, the conclusion that petitioners had standing created no conflict with the decision of another court. Rather, the case presented a standing question that defied categorization, could be compared only to cases involving noticeably different facts, and may never again come before the federal judiciary.

Judge Graber opined that the facts of this case were close enough to those of *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), to warrant a conclusion that jurisdiction was lacking. But *Valley Forge* involved an advocacy organization's challenge to a transfer of property to a religious organization. This Court held that the members of the organization were nothing more than "concerned bystanders" who "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence

presumably produced by observation of conduct with which one disagrees." *Id.* at 473, 485. Judge Graber's discussion of the differences between this case and *Valley Forge* was more convincing than her discussion of their similarities, and at a minimum it demonstrates there is no conflict with *Valley Forge*:

> In some ways, Plaintiffs' allegations evince a much stronger connection to the challenged governmental action. . . . The plaintiffs in *Valley Forge* had never visited, and had no other connection to, the land in question. Here, Plaintiffs reside in San Francisco, and Defendants operate as the San Francisco municipal government. . . . Additionally, Plaintiffs view the resolution as a direct attack on their specific religion: Catholicism. There may be some stronger connection to the challenged government action when the action is perceived as a direct attack on one's own religion, as distinct from a more general offense that the government is condoning or conveying religious messages with which one generally disagrees or to which one does not adhere. I acknowledge that Plaintiffs' residency and their perception of the government action as attacking their specific religion distinguish this case in significant ways from the Supreme Court's *Valley Forge* decision.

Pet. App. 67a. In sum, the connection between the plaintiffs and the government action in this case was

more direct, and the alleged injury was more tangible, than in *Valley Forge*.[6]

There is also no conflict between this case and the religious display cases discussed by Judge Graber. As she recognized, those cases, which tend to require that a plaintiff allege "frequent and regular" contact with a display to achieve standing, are only comparable by analogy. Pet. App. 74a (quoting, among others, *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1252 (9th Cir. 2007)). And the analogy is a loose one, because while those offended by religious displays may be made to feel like outsiders, a plaintiff whose religion is officially denounced by his legislature is the direct target of religious discrimination. Although his actual contact with the resolution is more attenuated, the alleged injury is heightened, and far more specific to the plaintiff.

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[6] In the same way, there is no conflict between the Ninth Circuit's jurisdictional conclusion below and the decisions Judge Graber cited as similar to *Valley Forge*, namely, *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010), *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007, 1016-17 (9th Cir. 2010), *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008), and *Flora v. White*, 692 F.2d 53, 54 (8th Cir. 1982). In those cases, the courts held the plaintiffs lacked standing because they alleged an injury no different from that suffered by any other member of the public who objected to the government policy at issue. *See, e.g.*, *Navy Chaplaincy*, 534 F.3d at 764 ("under plaintiffs' standing theory any recipient of the Navy's 'message' in this case, including the judges on this panel, would have standing to bring suit challenging the allegedly discriminatory Chaplain Corps.").

Finally, the complaint alleged that petitioners also had standing as taxpayers who objected to the use of government resources to pass the resolution. However, petitioners never presented this argument to the Ninth Circuit, and no judge below opined that petitioners had taxpayer standing. Judge Kleinfeld's opinion did not address the question, and Judge Graber's opinion briefly explained why taxpayer standing was lacking. Pet. App. 82a. Accordingly, this Court's pending decision in *Arizona Christian School Tuition Org. v. Winn*, No. 09-987 will have no bearing on this case.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Dated: March 25, 2011

Respectfully submitted,

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